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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

ALONZO W. LAWRENCE and JAMES SIMPSON,

Petitioners,

-vs-

BAUER PUBLISHING & PRINTING LTD., a corporation, KURT CHRISTOPHER BAUER, JEFFREY LANCE BAUER and PATSY BONTEMPO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED

1. In a libel action, to what extent does the voluntary involvement of a plaintiff in a public controversy render him a public figure?

2. In a libel action, what proof is necessary in determining actual malice for a public figure?

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The dissenting opinion of Justice Schreiber upholding the jury verdict in favor of the petitioner Simpson against all defendants except Bontempo and upholding the order for a new trial foı the petitioner Lawrence appears at App.38-67.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.Sec. 1257(3). The New Jersey Supreme Court's decision was decided on April 27, 1982 (App.1) and this petition for writ of certiorari is timely filed thereafter.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

This case also involves Section One of the Fourteenth Amendment to the United States Constitution which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

The two plaintiffs in this case are Alonzo W. Lawrence and James Simpson, who were respectively president and secretary-treasurer of an organization called the Rahway Taxpayers Association. The defendants are the Bauer Publishing and Printing Ltd., the publisher of a local newspaper called the Rahway News Record, its editor, publisher, and majority stockholder, Kurt Christopher Bauer, his brother, Jeffrey Lance Bauer, a minority stockholder, and Patsy Bontempo, a reporter for the newspaper. On January 9, 1975, the Rahway News Record printed in banner headlines against the top of the front page the following: "FORGERY CHARGES MAY LOOM FOR LAWRENCE, SIMPSON" (App. 67). The articles that accompanied this headline said in part as follows:

> "In separate actions city attorney Alan Karcher ruled the petitions filed by the officials of the Rahway Taxpayers Association are improper and attorney Theodore J. Romankow was

asked to take action by city officials against leaders because of 'irregularities' in the petitions.

"The Rahway News-Record learned Mr. Romankow was empowered to handle a case against Alonzo W. Lawrence, president of the association, and James Simpson, the group's secretary-treasurer.

"The city's case would be based on charges that forgery was involved in the gathering of approximately 5,000 signatures which the two men filed with the city clerk Robert W. Schrof on December 27, the News-Record was told.

"In connection with this the men would also be charged with false swearing of oaths and affidavits, it was asserted." (App.67)

On April 17, 1975, as a result of a demand for a retraction by the plaintiffs' attorney, the Rahway News-Record published a second article on the lower lefthand corner of the first page with the following headlines, "NEWS-RECORD ASKED TO RETRACT ARTICLE ON FIREHOUSE BATTLE" (App. 106). The article that accompanied this headline said in part as follows:

"The Rahway News-Record was asked to retract statements made in the January 9 edition concerning the article headlined 'Lawrence warns mayor on libel' 'City attorney rules association petitions improper; forgery charges may loom for Lawrence, Simpson.'

"The News-Record was told prior to publication of the January 9 edition by a source in the administration that city officials were turning the petitions over to the local prosecutor, which in fact they did, to investigate allegations of forgery and false swearing of oaths.

"It should be clearly stated that in each case where the charges were made, The News-Record was careful to note it 'was told,' it 'learned' or 'it was asserted.'

.....

"The fact of the matter is that the Rahway Taxpayers Association, of which Messrs. Lawrence and Simpson are officers, announced in a paid newspaper advertisement that it was 'spearheading' a petition drive seeking to bar added appropriations for the new firehouse.

.....

"The gentlemen, thus, are in fact associated with the petitions and the petitions are in fact the subject of an investigation for allegations of forgery and false swearing of oaths." (App.106)

The subtle difference between the first and second article should be noted and will be discussed in more detail in the argument. In the January 9, 1975 article, the article stated specifically that Mr. Romankow, the prosecutor, was empowered to handle a forgery case against Lawrence and Simpson as well as charges of false swearing against both men. The second article, which all parties admit was not a retraction, did not state that Lawrence and Simpson were being charged with forgery and false swearing--only that they are associated with the petitions and the petitions are under investigation for allegations of forgery and false swearing. The distinction made here in the two articles is important in determining whether or not actual malice existed.

In any event, it was the publication of these two articles that led to the present law suit. While there were many issues argued in various stages of the

proceedings, the decision of the New Jersey Supreme Court in setting aside a verdict for the defendant Simpson and an order for a new trial granted by the trial court to Lawrence rested its reversal on federal questions. The majority decision found that both Lawrence and Simpson were public figures and it also found that as public figures, the standard of actual malice required in the case of Gertz v. Welch, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) was not met.

The question of whether the plaintiffs were public figures was not raised by the defendants in their pleadings. Instead, the defendant raised the issue for the first time at the time of the trial by making a motion to amend their pleadings to set forth this issue. The trial court granted this application. All of the issues were then tried at the same time, including the issue of whether the plaintiffs were public figures. The defendant introduced into

evidence in support of his contention that the plaintiffs were public figures, some twenty newspapers articles published by the defendant's newspaper, all of which mentioned Lawrence and only one of which mentioned Simpson.

At the end of the trial, the trial court ruled that the question of whether the plaintiffs were public figures was a question of law to be determined by the court. The trial court then found that Lawrence was a public figure and that Simpson was a private figure. Its findings in this regard on both plaintiffs are set forth in the appendix (App.100-105). The Court then found no actual malice on the part of the defendant and dismissed Lawrence's complaint. The Court allowed the Simpson case to go to the jury, which awarded a verdict of $22,500 in favor of Simpson and against the defendant newspaper and the defendant Bauer. The jury ruled in favor of the reporter Bontempo.

However, on application made by the plaintiff the trial court reversed its decision concerning Lawrence on the ground that it had made a mistake. The trial court, in reversing its original decision stated that it believed there was sufficient evidence of actual malice to go to the jury and granted Lawrence's application for a new trial under the Gertz v. Welch, supra standard. The defendant's Leave to Appeal was granted by the Appellate Division and the Appellate Division upheld the decision of the trial court with respect to both Lawrence and Simpson (See App. 68-99). The defendants, thereafter, filed another motion with the New Jersey Supreme Court to allow the defendant to appeal, which was granted by the New Jersey Supreme Court, who reversed the decision of the trial court and the Appellate Division (App. 1- 37) on the ground that Lawrence and Simpson were both public figures and that no actual

malice was shown. There was a dissenting opinion by Justice J. Schreiber who did uphold the trial court's decision (App. 38-67). Justice Schreiber found that Lawrence should have been a public figure, that Simpson was a private figure and that there was actual malice shown sufficient to go to the jury on Lawrence's complaint.

Since the New Jersey Supreme Court's reversal was based on its interpretation of the federal law, we shall confine ourselves to the evidence that was submitted on the question of whether or not Lawrence and Simpson were public figures and the evidence concerning actual malice on the part of the defendants.

On the question of public figure, the evidence was as follows:

1. The Rahway News-Record is a small community paper with a circulation of approximately 4,800. It is the only local newspaper and the only paper which carried

the articles concerning the controversy (an out of town paper which had a small circulation in Rahway did not publish any article about the controversy). This newspaper was designated also as the official publication by the City of Rahway and as the official publication, published all the notices that the City had to publish that was required by law such as ordinances, resolutions, etc. This designation as the official newspaper brought in significant revenue to the newspaper.

2. The controversy that arose in the City of Rahway in 1974 concerned whether or not an additional $100,000 should be spent for the construction of a firehouse. The municipal council had passed an ordinance appropriating additional revenue for its construction. The Rahway Taxpayers Association spearheaded a drive to place the issue on the ballot by means of the referendum

process. This association did not take a position on whether or not the voters should approve or disapprove the amendment to the ordinance but was concerned only with the question of whether the voters should have the right to vote on the question. Under state law, N.J.S.A.40:69A-185, to place the issue on the ballot, twenty-five (25%) percent of the registered voters of Rahway needed to sign a petition requesting a referendum on the ordinance. Furthermore, under N.J.S.A.40:69A-186, there had to appear on each petition paper, the names and addresses of five voters designated as the committee of the petitioners. Simpson and Lawrence where two of the five committee of the petitioners.

3. The plaintiff Lawrence, as president of the Rahway Taxpayers Association, led the drive to place the matter on the ballot. The nineteen or twenty articles published by the Rahway News-Record

concerning the controversy mentioned Lawrence in each article. Simpson, however, was mentioned in only one article. Approximately 20 - 25 people obtained signatures on the petition sheets including Lawrence and Simpson. Lawrence obtained approximately 200 and Simpson approximately 250 names. Over 5,000 names were obtained on the petitions which exceeded the 25% requirement and Lawrence and Simpson were in a picture published by the Rahway News-Record in December, 1974 showing the petitions being delivered to the City Clerk. Lawrence and Simpson had made a practice of attending the monthly meetings of the municipal council. After the newspaper articles, Simpson withdrew from attending these meetings. At the trial of this matter none of the prospective jurors, including several who were from Rahway, had ever heard of Lawrence or Simpson or had read

about the controversy.

This summarizes the evidence that was submitted in connection with the determination of the public figure status of the plaintiffs. Based on this evidence, the trial court and the Appellate Division and the dissenting opinion of the New Jersey Supreme Court found that Lawrence was a public figure and Simpson was not. The majority opinion of the New Jersey Supreme Court found on the evidence that both Lawrence and Simpson were public figures.

With regard to the question of actual malice, the evidence produced at the trial was as follows:

1. The only source for the first article of January 9, 1975, was Joseph Hartnett, who had been appointed business administrator of the city in January, 1975. Mr. Hartnett had no official duties in connection with the filing or examination of the petitions, the State statute giving

these duties to the city clerk (N.J.S.A. 69A-188). Mr. Hartnett testified as a witness for the defendant and testified that he only told the defendant Bauer and the reporter Bontempo that the petitions were being investigated for forgery and false swearing. He stated emphatically that he never told the newspaper that Lawrence and Simpson were being investigated or charged with either false swearing or forgery. Insofar as forgery is concerned, Hartnett testified that the investigation of forgery concerned such instances as a husband signing a petition for his wife or vice versa. With regard to the false swearing charge the investigation centered on whether or not the requirement of N.J.S.A.40:69A-186 was met; namely, that there should be an affidavit attached to each circulator of the petition that he personally circulated the paper and that the signatures were made in his presence.

Bauer and Bontempo had both testified that Hartnett was a reliable source in the past.

After the defendant received the letter from the plaintiff's attorney demanding a retraction, the defendant Bauer became alarmed and consulted his attorney. His attorney, Mr. Leo Kahn, then arranged for a four-way conference call between Mr. Bauer, Mr. Kahn, the source, who was Joseph Hartnett, and Mr. Theodore Romankow, who was the local prosecutor who had been empowered to make an investigation of the petitions. The testimony concerning this conversation was uncontradicted and Hartnett made it quite clear in his testimony that in that conversation Hartnett again told Bauer that he never said that Lawrence and Simpson were under investigation for forgery or false swearing, nor were they guilty of those two crimes. He again reaffirmed that there was an investigation being made of the

petitions but not of Lawrence or Simpson. Bauer never denied that this was what Hartnett told him in this phone call. What Bauer choose to rely upon was a letter that Mr. Romankow, the prosecutor, wrote as a result of this telephone conversation. This letter, which was dated April 17, 1975 stated as follows:

> "It appears a question has arisen whether I was requested by the adminstration to investigate allegations of forgery and false swearing of oath concerning petitions seeking to bar added appropriations for the new Rahway Fire House circulated by the Rahway Taxpayers Assocation, whose leaders include Alonzo W. Lawrence and James Simpson.
>
> "Please be advised that I did conduct an investigation through the Rahway Police Department and I then requested that the matter be forwarded to the Union County Prosecutor's Office. The file, to my understanding, was forwarded."

Mr. Romankow testified as a witness for the defendant and admitted on cross-examination that he did not mean by that letter to state that Lawrence and Simpson were under

investigation and were going to be charged with forgery and false swearing. Bauer changed his tactics with the April 17th statement.

He did not retract the allegations made against Lawrence or Simpson concerning forgery and false swearing in the January 9th article even though he now knew again that Hartnett had stated that he had never told Bauer that Lawrence and Simpson were being charged or being investigated for these crimes. (It is conceded by the defendant that the April 17th article was not a retraction.) Bauer never denied that this was what Hartnett told him in that phone conversation. Instead the defendant attempted, by the April 17th article, to give the impression that the April 17th article was consistent with the January 9th article. Instead, there was a clear shift in emphasis by Bauer in the April 17th article because

now Bauer was only stating that investigation was being made of only petitions circulated by the Rahway Taxpayers Association, "whose leaders include Alonzo W. Lawrence and James Simpson." Bauer now knew without a doubt that Lawrence and Simpson were not investigated or charged with these crimes but he chose not to retract but instead hoped that a reader would overlook the clear error that he had made in the January 9th article.

It was on this evidence that the trial court reconsidered its dismissal of Lawrence's complaint. The trial court frankly admitted it had overlooked the significance of the evidence that lead to the April 17th article. The Appellate Division agreed with the trial court but the New Jersey Supreme Court found that it did not show actual malice on the part of the defendant.

ARGUMENT

POINT I. THE UNITED STATES SUPREME COURT SHOULD GRANT CERTIFICATION IN ORDER TO RESOLVE THE ISSUE OF THE EXTENT TO WHICH VOLUNTARY INVOLVEMENT OF A PERSON IN A PUBLIC CONTROVERSY RENDERS HIM A PUBLIC FIGURE.

In 1974, the United States Supreme Court in Gertz, v. Welch, supra, offered its general definition of "public figures":

> "For the most part those who attain this status have assumed roles of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence their deemed public figures for all purposes, more commonly, those classes public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment."

Since this decision, the United States Supreme Court has not had an occasion to consider to what extent the voluntary involvement of a person in a public controversy renders him a public figure. While the Court, since its decision in the Gertz v. Welch, supra has given considera-

tion to what constitutes a public figure, these cases have dealt only with the person's involuntary involvement in a public controversy.

Thus, in Wolston v. Readers Digest Ass'n, Inc., 443 U. S.157, 61 L.Ed.2d 450 (1979), the Court considered a situation where the trial court had found that a plaintiff had fallen into the second category of public figure, one who has thrust himself to the forefront of a particular controversy in order to influence the resolution of the issue involved. In this case, the lower court found that the petitioner was connected with Soviet espionage in the 1940s and 1950s. The United States Supreme Court, however, reversed the decision of the lower court stating that the plaintiff was not dragged willingly into the controversy and, therefore, did not "voluntarily thrust" or inject himself into the forefront of the

public controvery surrounding the investigation of Soviet Espionage in the United States. In reversing the lower court's decision the Supreme Court made the following statement:

> "Petitioner's failure to appear before the grand jury and citation for contempt no doubt were "newsworthy," but the simple fact that these events attracted media attention also is not conclusive of the public-figure issue. A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention. To accept such reasoning would in effect re-establish the doctrine advanced by the plurality opinion in Rosenbloom v. Metromedia, Inc., 403 U. S. 29, 44 (1971), which concluded that the New York Times standard should extend to defamatory falsehoods relating to private persons if the statements involved matters of public or general concern. We repudiated this position in Gertz and in Firestone, however, and we reject it again today. A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of New York Times. See Time, Inc. v. Firestone, 424 U.S., at 454."

In Hutchinson v. Proxmire, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979), the

United States Supreme Court reversed a decision of the District Court which held that the petitioner was a public figure because the petitioner had successfully obtained federal funds which were reported in a newspaper and because the petitioner had access to the media to respond to the defendant-senator's giving the petitioner "A Golden Fleece Award". In reversing the United States Supreme Court stated that, "Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." The Court held not only did the petitioner not become involved in any such controversy but that he had not "assumed any role of public prominence in the broad question of concern about expenditures". The Supreme Court further held:

> "Finally, we cannot agree that Hutchinson had such access to the media that he should be classified as a public figure. Hutchinson's access was limited to responding to the announcement of the Golden

> Fleece Award. He did not have the regular and continuing access to the media that is one of the accouterments of having become a public figure."

The present case for the first time explores the voluntary involvement of an individual in a public controversy and the extent to which his involvement renders that person a public figure. In this case, there are two plaintiffs with markedly different degrees of involvement in the controversy. The differences are set forth in the trial court's opinion which we have attached (App.100-105) where the court found that Lawrence was a public figure and Simpson a private figure. This is explored also in both the majority opinion of the New Jersey Supreme Court which ruled that both petitioners were public figures (App. 24-29) and the dissenting opinion which upheld the trial court's determination that Lawrence was a public figure and Simpson a private figure (App. 42-53).

The standard set forth in Gertz v. Welch, supra in determining the status of a public figure was whether the individual had thrust himself to the forefront of the controversy in order to influence the resolution of the issue involved. In arriving at different decisions, two factors were considered: (1) the action of each individual plaintiff; and (2) the defendant newspaper's reporting of the activity of the plaintiff.

The majority opinion cited both factors in deciding that both Lawrence and Simpson were public figures (App. 24-29).

With regard to Lawrence, the majority opinion found that he was the founder of the Rahway Taxpayers Association, he regularly attended council meetings and at one public meeting he was one of only five (5) people permitted by the City Council to speak on this issue on behalf of the public. It further found that Lawrence

initiated the petition drive, he was one of five persons whose name appeared on each petition sheet and that he collected at least 200 signatures. With regard to how the defendant newspaper handled Lawrence, the court found that he provided press releases to the newspaper and that his name had been mentioned in approximately 20 published articles in a few weeks prior to the publication of the January 9th article. It held that this was sufficient to justify the finding that Lawrence was a public figure (App. 24-27).

With regard to Simpson, the court found that he was secretary/treasurer of the Rahway Taxpayers Association and also one of the five member committee of petitioners whose name appeared on each petition as required by law. Simpson collected approximately 250 out of the over 5,000 signatures. The only involvement he had with the media was that he had

his picture in the paper in December, 1974 when the petitions were delivered to the City Clerk. On this basis the Court found that Simpson was a public figure (App. 27-29).

The dissenting opinion of New Jersey Supreme Court put Simpson's involvement in the proper focus (App. 49-52). It found that Simpson had written two (2) letters to the newspaper concerning the controversy and the second letter was in reply to a critic of the first letter he wrote. Of the thirteen (13) articles in the newspaper concerning the controversy, Simpson was only mentioned in one and this was an article in which Simpson was in a group picture delivering the petitions to the City Clerk. It found that he had obtained between 250 and 275 signatures on the petitions out of approximately 5,000 and that he was one of twenty who had done the same. The dissenting opinion found that

a review of the limited involvement of Simpson did not make Simpson a public figure. He did not, in other words, thrust himself "to the forefront of the controversy." The court found that Simpson did not qualify for a public figure by virtue of the requirements of the Gertz v. Welch, supra that the individual became a public figure because of the controversy and because he did not achieve special prominence in the resolution of the issue (App. 43-44). Justice Schreiber made the following conclusion:

> "One could reasonbly conclude, as did the trial court, that Simpson had not risen to that special prominence by virtue of his activities on the fire-house controversy. He had not sought to draw attention to himself to influence the public. He was part of a team of citizens who attempted to have the public vote on the issues. Though his role may have been somewhat more noticeable than others, he had not attained a special prominence because of the local publicity prior to the defamatory publications. The

trial court's comments are worthy of repetition:

> He was not in the vortex of this fight. He did not get the newspaper publicity. He acted more or less as a private citizen in attending meetings, making an occasional dispute. There's a dispute in the number of speeches he made. He talked ... occasionally at least and I do not think he meets the standards. So the Court will hold that Mr. Simpson, for the purpose of this litigation, is not a public figure."

So that the issue in this case is squarely met by the majority opinion and the dissenting opinion, namely, to what extent does a voluntary involvement of a person in a public controversy render him a public figure? It is submitted that the majority opinion is an improper application of the standards required by Gertz v. Welch, supra to determine whether a petitioner is a public or private figure. Simpson's name appeared in only one newspaper article,

he obtained signatures on petitions totaling less than five (5%) percent of the total signatures obtained, and the fact that he was listed on each petition as a member of the committee of petitioners was only because it was a statutory requirement. It is difficult to believe that he has thrust himself "to the forefront of the controversy".

It should be realized that this case is unique because it was during the trial that the defendants submitted its proof concerning the question of the public figure status of both petitioners. The sole proof offered by the defendant was twenty newspaper articles from the defendant's newspaper, thirteen of which dealt with the firehouse controversy. The defendant introduced no other witness and relied solely upon the newspaper articles that the defendant published. There was no testimcny by any of the defendants or their witnesses that Simpson was in fact a leader of the contro-

versy or that he had achieved any special prominence with regard to the controversy.

The danger of the majority opinion of the New Jersey Supreme Court if allowed to stand on the issue of public figure was pointed out in the dissenting opinion of Justice Schreiber where he stated:

> "Two highly motivated senior citizens are left without redress for libelous publications holding them up to contempt and ridicule in the community in which they have lived for many years. This is the result of their sincere attempt to participate in local government." ... (App. 30)
>
> . . . .
>
> "A freely expansive notion of a public figure in the context of this case defeats the major underlying purpose of the New York Times principle. It will throttle rather than foster public debate and criticism. The chilling effect on the individual's right of free speech is real. This case illustrates what may occur. After the libelous newspaper article appeared, Simpson stopped attending and speaking out at municipal council meetings. Lawrence, too, had second thoughts about his activity, though he

decided to continue. Citizen participation in local governmental affairs is to be encouraged, not discouraged. Broadly construing "public figures" to embrace townspeople whose only notoriety relates to debate over a local governmental controversy of the type exemplified in this case is counterproductive." (App. 54-55)

The dissenting opinion went on to quate Professor Eldredge in his treaties of The Law of Defamation (1978) as follows: (App. 55)

"'Suppose the private citizen criticizes the Board of Magistrates and charges corruption in the disposition of gambling cases in the city. If there can be unleashed against him a stream of false defamation under the protection of New York Times, his voice will soon be silenced, or made ineffective. And seeing this result, who will dare to speak out again in the same vein? Unbridled defamation concerning matters of public concern was a tool that Nazis used in pre-World War II Germany to destory important men and render unless what they said, the men whose messages desperately needed to be heeded.'"

In any event, the issue of the extent to which a person's voluntary involvement

in a public controversy makes him a public figure is squarely presented in this case. This is an important question that affects citizens in every municipality in the United States and it is an issue that should be considered by the United States Supreme Court so that the proper standard may be established.

POINT II. THE SUPREME COURT SHOULD GRANT CERTIFICATION ON THE ISSUE OF THE EXTENT OF PROOF NECESSARY TO RAISE A JURY QUESTION ON ACTUAL MALICE FOR A PUBLIC FIGURE IN A LIBEL CASE.

The second question for which petitioners are seeking certification assumes that either Lawrence and Simpson or both are public figures. What constitutes actual malice bothered the trial court. The trial court originally found, after declaring Lawrence a public figure, that no actual malice was shown. However, after a motion was made by Lawrence, the court reversed itself and granted Lawrence a new trial for the reason that, as stated by the trial court, "I think there is evidence that Mr. Bauer actually knew the charges were not true when the articles were printed."

The New Jersey Supreme Court, ruling that there was no actual malice shown, did

not analyze the evidence, but merely stated the following (App. 32-33).

> "Here, defendants honestly believed that the concededly misleading statements published in the two articles were true. Their misconcepts arose primarily from their conversations with Hartnett in which he told them that the petitions were under investigation for possible evidence of false swearing and forgery. Having been informed by Hartnett that petitions witnessed by both Lawrence and Simpson were among those being examined, defendants thought it was a reasonably certain implication that any such investigation would center around the activities of Lawrence and Simpson, who were known by the newspaper to be the key figures in circulating and filing the petitions."

The court went on to say that the post trial argument of Lawrence was merely that the information that the Defendant received from the source, Hartnett, and City Prosecutor Romankow was that "they should have known that the articles were false; or they at least should have doubted their accuracy" (App. 33). The court concluded that the evidence was "constitutionally

insufficient" to present a jury question of actual malice (App. 36).

The dissenting opinion, in sharp contrast to the majority opinion, found there was proof of actual malice sufficent to go to the jury in the following language:

> "Factual determinations had to be made in this case in order to ascertain the circumstances under which the publisher acted. There was a conflict in the testimony. The majority opinion accepts Bauer's version of the information related to him by Hartnett. However, Hartnett testified that he had at no time stated or intimated that Lawrence had forged any signatures on or falsely sworn to the propriety of the signatures on the petitions. At trial Hartnett went to great pains to clarify his conversations with the publisher. He maintained repeatedly that he had never linked either Lawrence or Simpson with the forgeries. In fact, he denied ever linking Lawrence to the charge of false swearing. If Hartnett is believed, then Bauer, who asserted Hartnett was the source of the newspaper's information, had no basis for implying that Lawrence had been

> guilty of forgery or false swearing in connection with the petitions. Despite this, Bauer printed the defamatory material relating Lawrence to an alleged forgery. It is questionable whether Bauer acted in good faith under these circumstances. Publication could certainly be held by a jury to fall within the scope of a reckless disregard for the truth. The trial court acknowledged as much when it granted Lawrence a new trial." (App. 66)

The majority decision relied heavily in its decision on the statement in the case of St. Amant v. Thompson, 390 U.S. 727, 20 L.Ed.2d 262 (1968) to the effect that "there must be sufficient evidence to permit the conclusion that the Defendant in fact entertained serious doubts as to the truth of his publication." (App. 34)

The petitioners recognize that the proof of actual malice calls the defendant's state of mind into question, (Hutchinson v. Proxmire, supra Ft. 9). However, in St. Amant v. Thompson, supra, the United States Supreme Court also stated that "the defendant in a defamation action brought

by a public official, cannot, however, automatically insure a favorable verdict by testifying that he published in the belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith."

The fact situation of the St. Amant v. Thompson, supra is in sharp contrast to the fact situation present in our case. In St. Amant, supra, Mr. St. Amant made a statement concerning the criminal conduct of Mr. Thompson, relying on a story he was told by an informant by the name of Albion. Thompson tried to show actual malice by showing that St. Amant failed to verify the information given him by Albion. The United States Supreme Court held that this was not sufficient evidence to prove actual malice.

In our case the situation is entirely different because the informant testified that for both the January 9th and April 17th article that he never told the defendant that Lawrence and Simpson were under investigation for forgery or false swearing.

This would appear to raise a question not present in the St. Amant v. Thompson, supra as to whether the publication was made in good faith.

Despite the statement made by the New Jersey Supreme Court, the issue is clearly not one of whether the defendant should have known or at least doubted the accuracy of the information given; rather the issue is insofar as the January 9th article is concerned, whether the defendant or his informant is to be believed as to the knowledge that the defendant had concerning the allegations made by the newspaper against Lawrence and Simpson concerning forgery and false swearing. This, the Supreme Court indicated in the St. Amant v. Thompson, supra case, was something for the trier of fact to determine.

We also call the court's attention to Hutchinson v. Proxmire, supra. In this case, the District Court said that in determining

whether a plaintiff had made an adequate showing of "actual malice," summary judgment may well be the rule rather than the exception. The Supreme Court stated:

> "Considering the nuance of the issues raised here, we are constrained to express some doubt about the so-called 'rule.' The proof of 'actual malice' calls a defendant's state of mind into question. New York Times Co. v. Sullivan, 376 U. S. 254 (1964), and does not readily lend itself to summary disposition."

While this matter came before the court, not on a motion for summary judgment but at the end of the plaintiff's case, the effect is the same and the New Jersey Supreme Court has by its decision abrogated the right of the finder of fact to make the determination.

With regard to the April 17th article the issue of actual malice is raised in a different fashion. In this instance the petitioner had demanded a retraction and the defendant, instead of ignoring the demand, chose to reply to the retraction demand in an article on the front page of

of his newspaper. Even the defendant now concedes that the April 17th article was not a retraction and the majority decision of the New Jersey Supreme Court also found that it was not a retraction (App. 6).

The uncontested testimony was that Bauer gave Hartnett a draft of his April 17th article in which he again repeated the allegations of criminal conduct on the part of Lawrence and Simpson. Hartnett testified that he again told Bauer that he was incorrect in reporting that Lawrence and Simpson were involved in criminal conduct.

Hartnett's statement at his deposition (which at the trial he conceded was accurate) concerning the four-way telephone call and the draft of the April 17th article was as follows:

> "I don't know that I can recall exactly specific statements in terms of words I objected to, but I can certainly give you the gist of what I corrected. The draft copy which Mr. Bauer showed to me, he made attribution for statements involving allegations of forgery charges

> against your plaintiff . . .
> Made such attribution to me and
> I indicated to him that that was
> not correct; that at no time I
> had made such statement to him."

As a result, Bauer redrafted the April 17th article in the form in which it was published (App. 106). He attempted to protect himself by having Prosecutor Romankow write a letter which we have quoted at p. 20 of this petition. Romankow admitted that this letter was not intended to accuse Lawrence and Simpson of forgery or false swearing and when he was asked, "You were not trying to imply in any fashion that Mr. Simpson and Mr. Lawrence were under investigation for forgery, were you?", he answered "no".

Bauer used the Prosecutor's letter to justify the statement in the April 17th article that Lawrence and Simpson "are associated with the petitions and the petitions are in fact the subject of an investigation for allegations of forgery and false swearing of oaths." (App. 106)

It would take a very sophisticated reader to realize that Bauer had retreated from his direct allegation of criminal conduct on the part of Lawrence and Simpson in the January article to merely stating that the petitions were under investigation and that Lawrence and Simpson were not involved in any wrongdoing in connection with the petitions.

Bauer, incidentally, would never confirm or deny what Hartnett told him. For example, he was asked on cross examination:

> "Did he (Hartnett) ever tell you that Mr. Lawrence and Mr. Simpson, personally, were investigated by him for possible forgery of the petition of signatures on the petition?"

His answer was, "What is in the letter, sir?" referring to the letter that Romankow had written.

It would appear that the April article also raises a question concerning whether

or not there was actual malice on Bauer's part. There was no question that in April, Bauer knew that he could not claim (as he said in the January article, that Lawrence and Simpson were involved in criminal charges, but Bauer could not bring himself to print in the April article the one fact that Hartnett had made clear to him; namely, that Lawrence and Simpson were not linked to forgery or false swearing charges. Even if it is assumed that Bauer misunderstood what Hartnett told him about Lawrence and Simpson before he published the January article (something that is doubtful considering Hartnett's testimony), there can be no question that Bauer understood what Hartnett told him in April because Bauer redrafted his article after Hartnett had again told him that he had never linked Lawrence and Simpson to any forger or false swearing charges. This was uncontested by Bauer. The result is that Bauer knew

that his article of January 9th concerning Lawrence and Simpson was false when he printed the April 17th article, but he still persisted in attempting to give the impression that Lawrence and Simpson had some connection with criminal conduct. It should be noted that the New Jersey Supreme Court found, as a matter of law, that both the January article and the April article were defamatory (App. 36).

We believe that the evidence presented concerning the publication of the two articles falls into the class of statement discussed in Garrison v. Louisiana, 379 U.S. 64, 13 L.Ed.2d 125, 85 S.Ct. 209 to the effect that:

> "Calculated falsehood falls into that class of utterance which, 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'"

In any event, this is not a situation as found by the New Jersey Supreme Court where the issue was whether or not the defendant "should have known that the article was false." As the dissenting opinion stated, "He (Hartnett) maintained repeatedly that he had never linked either Lawrence or Simpson with the forgeries" (App. 66). So this is not a St. Amant v. Thompson, supra situation where there was no evidence to indicate that the informant's information was untrue. Here, the informant himself testified that he told the defendant that what he published was untrue.

All this decision points out is the fact that the New Jersey Supreme Court has taken a rather limited view of what evidence should be considered in deciding whether there was actual malice and how that evidence should be interpreted.

The opinion of the New Jersey Supreme

Court, instead of examining the evidence to see whether or not there is substantial evidence to send the matter to the jury on the question of actual malice, has examined the evidence as a finder of fact and determined the publisher only misinterpreted what was told him by the informant. This, we submit, is not what the United States Supreme Court intended when it required a finding of actual malice in St. Amant v. Thompson, supra. The Supreme Court stated that it is the finder of fact who must determine whether the publication was made in good faith. However, the New Jersey Supreme Court, and the contrasting dissenting opinion, has brought into sharp focus the standard of evidence necessary to prove actual malice, and the question of who should have the right to make the determination, the trial court judge or the jury. We believe that the determination of this issue should be

made by the United States Supreme Court. For the reasons expressed above the petitioners request certification on this important issue.

CONCLUSION

It is therefor respectfully submitted that the petition for writ of certiorari be granted.

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